No. 13564

IN THE

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant*

v.

RICHARD W. DOUGLAS, *Appellee*

On Appeal from the United States District Court for the Eastern District of Washington

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BRIEF FOR RICHARD W. DOUGLAS, APPELLEE

FILED

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SUPPLEMENT TO STATEMENT

The statement of governing facts included in the Appellant's Brief requires some slight correction and amplification.

On Page 4 of Appellant's Brief counsel says that the land in question is "part of a vast area — at present inaccessible and uninhabited." The record shows that there are roads to the land and beside it (R. p. 172). Counsel will not dispute that the only reason the land is inaccessible is because the land is now part of the area to which access is denied by Government regulation, presumably for supposed reasons of safety since the land is in the general neighborhood of the great plutonium plant at Hanford.

It certainly was not inaccessible until put into a zone where travel is prohibited.

On the same Page 4, Appellant says that "The project is not in operation —." Very evidently this brief was written by a counsel in Washington, D. C., who is not informed of the progress on the Columbia Basin project. It is believed that the court will take judicial notice of the fact that the project is already in operation on some of the more northerly lands in the area. The Columbia Basin irrigation project is already a going concern.

The statement offered by Appellant does not make entirely clear the fact that Mr. Douglas and his wife owned this land for a long time prior to 1937. By special provision of law (Columbia Basin Project Act, Sec. 835a (b) (I, III and IV) in U. S. C. A., Vol. 16, pocket part, pages 242-243), the owners who held title prior to 1937 are not restricted to a mere "subsistence farmstead" of 40 acres. If they owned as much as a quarter section, or a so-called "nominal" quarter section which has acreage slightly over 160 acres, such owners are permitted to retain all of it and no part of such holding is to be regarded as excess land. The term excess land is here used in the sense of the Reclamation Act and the contracts made by the Government with the three districts into which the Columbia Basin project was divided; that is, land which the settler is not entitled to keep but which may be sold by the Secretary of Interior for the Department of Interior under that power-of-attorney given in the "recordable contract."

The point of all this is that Mr. Douglas had no excess land, and he could not be compelled to part with any of his property under the recordable contract.

ARGUMENT

The gist of the Appellant's Brief is an argument that the price to be received for Mr. Douglas' land should be fixed by the appraisement figure of about $8 per acre, placed upon the land years ago when the Columbia Basin project was started.

The gist of our argument in resistance to this claim is that as between the Government and Mr. Douglas the old appraisement became of no force whatsoever for two independent reasons. Either of these would prevent control by the old appraisement. These reasons are:

1. The appraisement made under the provisions of the "recordable contract" had force only so long as the contract was in effect. But the contract was abrogated by the taking. The United States is no longer under a duty to supply water to the land in question, and Mr. Douglas likewise is released from the terms of that contract.

2. The subject matter of the taking here was not the land alone, but the contract rights as well. The *res* appropriated by the Government was title to the land plus all the contract rights which Mr. Douglas had enjoyed up to the moment of the taking. The old appraisement applied to the land alone.

These contentions are amplified in the following paragraphs.

It is essential in studying this case to have clearly in mind that there was a contractual relation between Mr. Douglas, the Appellee, and the United States. The contract provisions are set forth at length in the formally executed agreement between the United States and the South Columbia Basin Irrigation District, which appears in the Record at pages 67 to 126 inclusive. It was executed on October 9, 1945, and signed on behalf of the Government by Harold L. Ickes, Secretary of the Interior, and on the part of South Columbia Basin Irrigation District by the President of its Board of Directors. By this undertaking the Government committed itself to deliver water to the lands of a very large number of landowners in the district, provided that they lived up to the conditions fixed for them in the contract. First of these was that they should enter into individual contracts in the form designated as the "recordable contract," binding themselves to accept an appraisement on the land (to be made promptly) and thereafter not to sell the land for any sum greater than the value fixed by such appraisement, throughout a period which would end five years after water was delivered on the land. Conforming with the Columbia Basin Project Act and with this master contract between the Government and the South Columbia Basin Irrigation District, these recordable contracts further provided that a power-of-attorney was created and given to the Secretary of the Interior, whereby he might sell any excess land held by the indi-

vidual landowner, either to the Government or to third parties, at the rate fixed by the appraisement.

Excess lands were such as any individual might own beyond the acreage he was allowed to keep under the terms of the act. For most settlers the permanent holding was a "subsistence homestead" of 40 acres. But for those who held their titles at or prior to the year 1937, a full quarter section or a "nominal quarter section," consisting of 160 acres plus the few acres in addition to that number occurring through familiar adjustments in the Government surveys, might be held by such individuals free from operation of the power of attorney. Mr. Douglas was in this class; his title goes back much further than 1937.

Without elaborating the obvious, it is clear that the master contract made by the Government with the South Columbia Irrigation Distict was a contract for the benefit of third persons; these persons were the individual settlers. They ratified and adopted such master contract, and conformed to its terms in entering into the individual contracts which are conveniently designated as the "recordable contracts."

Mr. Douglas had therefore made a bargain with the Government. His part of the agreement was that he would comply with the terms of his recordable contract (set forth in the Record at Pages 40 to 42 inclusive). The Government on its part agreed to complete the various engineering works necessary and to deliver water to Mr. Douglas' land. There was a contingency recognized which might have defeated

this contract, in that Congress might have abandoned the project or failed to make the great appropriations necessary to carry it through. Those contingencies however are of the past. The court will take judicial notice of the fact that the Grand Coulee Dam has been built, also the equalizing reservoir, and canals which are already diverting water of the Columbia River down to the thirsty acres of the sage-brush country. It was proved and not disputed that the controlled water would have reached Mr. Douglas' land about 1954.

It is thus seen that the appellee had contract rights which had become very valuable to him by the time of the taking in March, 1951, and these were entitled to the protection of law. He had never violated his side of the contract nor done anything to forfeit it. Yet the contract is at an end. It is completely abrogated, through the power of eminent domain. The Government has done what a private individual could not do; it has destroyed the contract completely, its own obligations and Mr. Douglas' obligations. It is not a breach of contract for the sovereign thus to appropriate contract rights; the power of eminent domain makes such a course legally possible. And it should follow as a simple and clear result that when the contract is ended as to one party it is likewise ended as to the other party. It is unconscionable for the Government to assert that although it is no longer bound to deliver water to this particular land which has been condemned because its contract to do so has been ended by the taking, Mr. Douglas

should still be bound by that contract and should still be under the compulsion of the old appraisement. As to this argument, that the landowner is still bound by the appraised price, it would be just as sensible for us to claim that the United States is still bound to deliver water to the edge of this tract. This is an absurdity; it is no less absurd to claim that Mr. Douglas is bound by his contract when the Government is released through its act in taking and in effect destroying his contract by the power of eminent domain.

This land never will be irrigated. It has been seized and dedicated to the interests of the Atomic Energy Commission. There is no point any longer in considering the provisions of the Anti-Speculation Law, pursuant to which these appraisements were made. As to this land, the Columbia Basin project is a thing of the past. It is of importance here only to the extent by which the great works and the near approach of the water had already affected the intrinsic value of the land at the time of the taking on March 15, 1951. It will hardly be disputed that value over and above that of raw land had been built up, as the project approached fruition and the water neared the land. The great Coulee Dam, the equalizing reservoir and the canals were not built solely for the benefit of the northerly acres now under water. These tremendous improvements have shed value month by month and year by year, as they progressed, over every acre to which water was promised. It is this accumulated value which the United States seeks now to take from Appellee, by insisting

on the original appraisement figure based on the value of this tract as raw grazing land when it was valued ten or twelve years ago.

While the project was new and in its earliest stages, some owners doubtless have seen fit to part with their land for the appraisal figures. They might have been impelled by necessity or desire for a change. But it is obvious that as the water came near no owner would want to sell his land for the appraised value which bound him. After holding so long he would be eager to enjoy or realize upon the added value which irrigation could give to this exceedingly fertile land. This is the reason why landowners have been unwilling to sell, as shown in the testimony of Mr. Donaldson (Record p. 364) and Mr. Miller (Record p. 486). The nearest approach to an open market was seen in those auctions of school land conducted by the State of Washington, which is not bound by the recordable contracts. These auctions were held less than a year before the trial and indicated values as high or better than the figure adopted by the jury.

We turn now to the second reason why the Government's position is untenable. What was taken here was not only land; Mr. Douglas' contract with the United States was taken at the same time. The *res* which is the subject-matter of condemnation is land-plus-contract. It is neither just nor permissible to look at the land alone and say that nothing else was taken. Even if it should be thought that the land might still be had lawfully without paying more than the appraised price, the court we think would be will-

ing to regard that other property right of Mr. Douglas' which has been seized, namely the contract, and realize that no appraised value has been set on it. The contract right is property too, and the appraisement set on the land a dozen years ago could not advise the court what the contract right would be worth in 1951. The appraisal, then, goes only to a part of the *res* taken. There is no set price on the value of the contract. And a contract is just as much property as land is.

There is ample authority on this point.

In a southern case a county had bought a right of way to obtain a bridge site; there was a provision in its contract that its bridge must be built high enough to make clearance for a dam intended to be built by the owner. But the county changed its plan and condemned the same ground as a bridge site, thereby abrogating its earlier promise to make clearance for the dam. The court held that the contract was an integral part of the *res*, and compensation was ordered to be assessed on the value of the land taken as enhanced by the value of the contract.

> "But the right acquired by the Complainant—assuming the binding obligation of the stipulations of the grant—must have protection. If that contract has contributed to the value of the site which the county proposes to condemn, such increment of value will be taken into consideration in extending the just compensation to be paid for the site." *Brown vs. Jefferson County*, 211 Ala. 517—101 Southern Reporter 46.

In *Brooks-Scanlon Co. vs. U. S.*, 265 U. S. 106—68 Lawyer's Edition 934, the facts were that the Gov-

ernment commandeered a partly-built ship in war time and along with the ship took the benefit of the contract under which it was being constructed. Compensation offered the owner was based only on the value of the unfinished ship; but the original owner showed to the satisfaction of the Supreme Court that the contract itself was of great value to him as well as the physical assets appropriated. The question was whether the physical property alone was the *res* for which payment must be made or whether it was the ship plus the contract. The Supreme Court held that recovery must be allowed for more than the tangible property, and that the contract loss must be compensated also. Heart of the opinion is found in these words:

> "The award was erroneous because of the failure to find the value of the contract rights taken."

Dealing with this same concept of land-plus-contract, as being the *res* taken under eminent domain, we note the Supreme Court case cited below. The Government, acting under directions of an act of Congress, undertook to condemn a "Lock and Dam No. 7" on the Monongahela River, this property being owned by appellant. A circumstance which brings our point into sharp relief is that the act of Congress specified that there should be condemnation of the lock and dam, but that nothing should be paid for the franchise of the corporation under which it collected tolls from the public, for use of its facilities at the lock and dam. In other words, the Congress was assuming to instruct the Government officers to condemn

the physical property, but to pay nothing for contract rights. This rather disingenuous idea was smashed flat by the Supreme Court, which said first of all in the opinion that Congress had no power to prescribe what the compensation should be, that the measure of compensation was a judicial question, and that the taking of the contract or franchise was taking the property of the owners just as much as taking masonry and steel that made up the improvements.

> "The bridge structure, the stone, iron, and wood, was but a portion of the property owned by the bridge company, and taken by the government. There were the franchises of the company, including the right to take toll, and these were as effectually taken as was the bridge itself. Hence, to measure the damages by the mere cost of building the bridge would be to deprive the company of any compensation for the destruction of the franchises. The latter can no more be taken without compensation than can its tangible corporeal property. Their value necessarily depends upon their productiveness."

Quoting further from the latter part of the opinion, we find this:

> "But this franchise goes with the property; and the Navigation Company, which owned it, is deprived of it. The Government takes it away from the company, whatever use it may make of it; and the question of just compensation is not determined by the value to the government which takes, but the value to the individual from whom the property is taken; and when by the taking of the tangible property the owner is actually deprived of the franchise to collect tolls, just compensation requires payment not merely of the value of the tangible property itself but also of that of the franchise of which he is deprived."

Monongahela Navigation Co. v. U. S., 148 U. S. 311—37 L. Ed. 463.

In offering his criticisms of the trial judge's comment (in absence of the jury) that the property of Mr. Douglas had acquired a value above the appraisement, it seems to us that opposing counsel rather misses the judge's point. The court was comparing the "farmstead" land with "excess" land; as to the latter every owner has given the Secretary of the Interior a power to sell, in the owner's name, for the appraised figure. Therefore the owner of excess land cannot claim to have any indefeasible contract right to have his extra land irrigated. In effect he kissed his excess land good-bye when he signed the "recordable contract." He cannot ask a greater price than the appraisement, even on a condemnation. But it is quite otherwise with the owner of a farm unit or "farmstead." His own land he is entitled to have improved, through completion of his irrigation contract. This is the distinction the court was making.

But "retention value" has been condemned by the Supreme Court, says counsel. Let us observe what the Supreme Court was talking about in the cited case (*U. S. v. Commodities Corp.*, 339 U. S. 121, 94 L. Ed. 713). Value being fixed there was that of black pepper, a highly speculative item, which had been requisitioned by the Government in war time. The owner was not a trader, he was an "investor," i. e., a speculator, and the retention value he claimed was based on the expectation of future profits, to be realized in later years through fluctuation of the market. Speculative future profits—that was what

he wanted, describing his wish with the words "retention value." What the court held was a refusal to allow future profits, either by that name or under the specious title of "retention value."

But there is no element of future profits to be seen in appellee's award. He was not asking for any increment of value, to be added to this land in the future. He asked and received only the jury's estimate of that value which had been accumulated under his contract up to the moment of taking. He asked only that the situation be viewed as it had crystallized on March 15, 1951. Recognizing that the contract had been abrogated, he was not demanding any compensation for future values that would have been created by further progress in irrigation development. He asked, and got, only the value which had been accumulated up to the moment of taking. His position is entirely different from that of the speculator in black pepper, who wanted to hold his goods —to assert a "retention value"—in the hope of values to be created in the future.

In passing we might note that the Supreme Court said in the cited case that a so-called retention value might be allowable under some conditions. We quote:

> "And exceptional circumstances can be conceived which would justify resort to evidential forecasts of potential future values in order to determine present market value."

This from page 126 in the official report. An inviting argument might be offered to show that this would be such an exceptional case. But it is believed that we do not need to invoke the exception. We feel

that we have shown that the valuation awarded here had no aspect of the speculative "retention value" condemned by the Supreme Court.

We should not close this discussion without a brief notice of the authority relied on by opposing counsel, concerning the effect of ceiling prices. It is true that in many cases the courts have recognized that the ceilings affected market value and were therefore allowed to control. But let it be remembered that in all such cases as those cited in the opposing brief the ceilings were obligatory on everybody by direct force of law. Here the appraised value which counsel wants to treat as a ceiling was not fixed by law, but was a matter of contract between appellee and the Government. We have already shown that such restriction perished along with the contract which set it up. Furthermore it is to be remembered that all the cases cited were concerned with the taking of a physical *res* only and were not complicated by the simultaneous taking of intangible property in the form of a contract right. Such a right has been destroyed in the case at bar, and it has no "ceiling price." There was no artificial restriction set to govern the value of this bargain with Uncle Sam.

We believe these arguments are persuasive for affirmance, and submit them accordingly.

Respectfully,

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